

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company For Expedited Approval Under Public Utilities Code Section 851 For An Easement Over PG&E Fee Property to the City of Suisun City for Construction, Public Access and Maintenance of a Bicycle and Pedestrian Path. (U 39 M)

Application 02-06-026
(Filed June 14, 2002)

**OPINION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE
SECTION 851 FOR CONVEYANCE OF EASEMENTS BY PACIFIC GAS
AND ELECTRIC COMPANY TO SUISUN CITY FOR CONSTRUCTION OF
BICYCLE AND PEDESTRIAN PATH**

1. Summary

This decision grants the unopposed application¹ of Pacific Gas and Electric Company (PG&E) for Commission authorization under Public Utilities Code Section 851² to grant a non-exclusive easement to the City of Suisun City (Suisun). The easement will enable Suisun to construct, maintain, and provide public access to a new bicycle and pedestrian path over PG&E fee property.

¹ The application was filed on June 14, 2002. In Resolution ALJ 176-3090, dated June 27, 2002, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings are unnecessary.

² All statutory references are to the Public Utilities Code unless otherwise referenced.

2. Request

On June 14, 2002, PG&E filed this application requesting expedited approval of an easement with Suisun under Pub. Util. Code § 851. PG&E filed a motion concurrent with its application to shorten time to respond to the application on June 26, 2002. The assigned Administrative Law Judge (ALJ) issued a ruling shortening the protest period.

3. Background

Suisun is located between San Francisco and Sacramento in Solano County. State Route 12 runs east-west through the center of Suisun, and is the only east-west arterial crossing the full length of town. There are no pedestrian or bicycle facilities along State Route 12 at this time. The project is construction of a concrete bicycle and pedestrian path along the north side of State Route 12.

The project will be constructed primarily in Suisun right-of-way, but crosses a parcel of PG&E land along the route. The PG&E property involved in the project is used for gas transmission purposes. The size of the easement is 45 feet by 20 feet. A legal description and plat of the easement are attached to the proposed easement agreement as Exhibits A and B, respectively, and are incorporated into this decision by reference.

Suisun has received federal and state grant funding of \$1.5 million for the construction of this project. Suisun needs to obtain the proposed easement from PG&E as quickly as possible in order to start construction and to meet its schedule for completion of the project by September 2002, or risk losing federal and state grant funding for the project.

Notice of the filing of PG&E's application appeared in the Commission's June 24, 2001 Daily Calendar. By ruling, the assigned ALJ shortened the protest period to July 1, 2002. No protests were filed.

4. Proposed Easement Agreement

PG&E has filed a proposed agreement with Suisun, to be executed if the Commission approves this application. In the easement agreement, PG&E grants a non-exclusive easement to Suisun to construct, maintain, and use a ten foot wide paved bicycle and pedestrian path as part of the Central County Bikeway Project. Suisun generally may not assign the easement.³

PG&E has reserved the right to use the easement area as necessary and appropriate to serve its patrons, consumers, and the public. Under the agreement, Suisun must coordinate with PG&E to minimize interference with PG&E's use of the easement area and the adjoining PG&E land. Suisun may not create a nuisance or otherwise use the easement area in a way that endangers human health and safety, PG&E facilities, or the environment. Suisun's use of the easement area must be compatible with the applicable Commission General Orders and decisions and other legal requirements. Suisun must maintain the easement areas in good condition. Suisun may not construct additional facilities in the easement areas without the prior consent of PG&E and, when legally required, the Commission.

In addition, with certain exceptions,⁴ Suisun has agreed to indemnify and defend PG&E from any claims for liability for personal injury (including death)

³ Suisun may assign the easement only in connection with a future conveyance of the Central County Bikeway Project, and this property remains in use as a bicycle and pedestrian path.

⁴ Suisun's indemnification of PG&E does not include any claim arising from the sole negligence or willful misconduct of PG&E, or claims related to the presence of hazardous materials or substances in, on, under, or about the easement area, which do not result from the introduction of hazardous substances or materials on the site by Suisun, Suisun's negligence or intentional misconduct, or the exacerbation of environmental conditions on the site by Suisun. Suisun otherwise indemnifies PG&E

Footnote continued on next page

or property damage in the easement area, violation of any legal requirement, or strict liability imposed by law, which arise from Suisun's occupancy or use of the easement area. Suisun has previously inspected the property and agreed to accept all risks related to its use of the easement area, and has acknowledged the possible presence of potential environmental hazards in, on or about the easement areas.⁵ In order to further protect PG&E from liability, Suisun must carry a specified level of insurance coverage during the term of the agreements.⁶

Suisun will pay PG&E \$1,800 for all four easements.

5. Environmental Review

The California Environmental Quality Act (Public Resources Code Section 21000, et seq., hereafter CEQA) applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities." (Title 14 of the California Code of Regulations, hereinafter CEQA Guidelines, Section 15002.)

from all claims connected with the release or spill of any hazardous substance connected with Suisun's use of the easement area.

⁵ The agreements define "potential environmental hazards" to include hazardous wastes, polychlorinated biphenyls (PCBs), special nuclear or byproduct materials, radon gas, formaldehyde, lead contamination, fuel or chemical storage tanks, electric and magnetic fields or other substances, material, products or conditions.

⁶ This insurance must include commercial general liability insurance, which names PG&E as an additional insured, in the amount of \$1 million per occurrence, with additional coverage for defense costs; business auto insurance; and workers compensation and employer's liability insurance. As a public agency, Suisun may self-insure for some or all of these obligations. However, if Suisun opts to self-insure, it is liable to PG&E for the same amounts specified in the insurance requirements stated in the agreements and is held to the same standards of good faith and promptness as a third party insurance company.

Since the proposed project is subject to CEQA and the Commission must issue a discretionary decision without which the project cannot proceed (i.e., the Commission must act on the Section 851 application), this Commission must act as either a Lead or a Responsible Agency under CEQA. The Lead Agency is typically the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines Section 15051(b)).

The application states that Suisun is the lead agency for CEQA. However, the California Department of Transportation (Caltrans) prepared an Environmental Study to satisfy CEQA and National Environmental Policy Act (NEPA) requirements on behalf of the Federal Highway Administration (FHWA), the federal lead agency for the project. Although Caltrans' joint CEQA/NEPA role with the FHWA suggests that it, rather than Suisun, may have been the appropriate lead agency for CEQA, nonetheless it appears that the Commission is a responsible agency for purposes of CEQA review for the portion of the project involving PG&E land.

As a responsible agency, the Commission must consider the lead agency's environmental documents and findings before acting upon or approving the project. (CEQA Guidelines Section 15050(b)). CEQA Guideline Section 15096 enumerates the general process for a responsible agency.

On January 28, 1999, the City of Suisun City Community Development Department filed a Notice of Exemption with the County Clerk's Office for the proposed project. According to the Notice, the project is categorically exempt from CEQA review under CEQA Guideline Section 15301(c). Section 15301(c) provides a Class 1 categorical exemption from CEQA for the "operation, repair, maintenance...or alteration of...existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety) except where the activity will involve

removal of a scenic resource including a stand of trees, a rock outcropping, or an historic building.”

In July 2001, Caltrans released a Draft Natural Environmental Study for the Central County Bikeway Project (Study) for purposes of CEQA and NEPA compliance. The Study indicated that the proposed project was expected to qualify for both NEPA categorical exclusion and CEQA categorical exemption pursuant to the FHWA NEPA regulation (Code of Federal Regulations (CFR), Title 23, Part 771 (23 CFR 771)), and Chapter 6 of Caltrans Local Assistance Procedures Manual. The Study was limited in scope to issues involving the biological resources in the project area.

The Study found that the proposed project will not directly impact plants or wildlife species that are federally listed as endangered or threatened (special-status). However, the project would result in a direct impact to the natural environment by the loss of 1.69 acres of annual grassland and landscaping that may be foraging habitat for specified species. Four potential impacts were listed involving the disturbance of nearby seasonal wetland habitats, the disturbance of the McCoy Creek, the loss of Suisun Marsh aster plants, short-term disturbance to breeding and wintering burrowing owls, and short-term disturbance to potential foraging habitat for the California black rail and California clapper rail.

Mitigation measures were not specifically proposed or ultimately adopted by the Study. However, the Study stated that all potential impacts will be avoided by four specific “project commitments” Suisun will implement as a part of the proposed project. These are: 1) erecting fencing prior to construction to protect the McCoy Creek as an environmentally sensitive area; 2) erecting fencing prior to construction to protect the nearby seasonal wetland; 3) conducting a pre-construction raptor nest survey if construction will occur in 2002 during the breeding season of the burrowing owl or northern harrier; and

4) preparing and implementing a storm water pollution prevention program. In addition, because the land along the corridor has been developed, programmed for development, or restricted from further development and because the project is an improvement to a currently used bikeway, the proposed project is not expected to induce growth along the project corridor.

In August 2001 a CEQA/NEPA categorical exemption/categorical exclusion determination was issued by Caltrans and FHWA for the project. The Caltrans determination found the project to be categorically exempt pursuant to Class 4 (Section 15304(h)) of the CEQA Guidelines pertaining to minor alterations to land including the creation of bicycle lanes on existing rights of way, and/or CEQA Guideline Section 15061(b)(3), providing an exemption when it can be seen with certainty that there is no possibility that the activity may have a significant effect on the environment. The FHWA determination provided a similar NEPA exclusion on the basis that the action would not individually or cumulatively have a significant environmental effect.

While we are frequently a responsible agency for CEQA review purposes, it is not common that we review applications involving both limited issue studies (in this case, biological resources) as well as determinations of exemption. Nevertheless, we have considered the Study and the Notices of Exemption submitted with this application and find that they are adequate for our decisionmaking purposes under CEQA. With respect to the issues raised by the Study, we note that the potential impacts related to special-status plants and wildlife properly fall within the primary purview and expertise of the Department of Fish & Game or U.S. Department of Fish and Wildlife. To the extent the Study concludes that any potential impacts will be avoided by the “project commitments” and there are no direct impacts resulting from the project, we are not aware of facts or information to contradict those conclusions.

Additionally, although the particular circumstances noted here seem unusual, we do not believe there is reason to take issue with the exemptions granted by Suisun, Caltrans, and FHWA. We recognize that CEQA and NEPA provide legitimate exemptions and exclusions for the type of activity that will be undertaken following our approval of this application.

Accordingly, we find that Caltrans and FHWA reasonably concluded that the “project commitments” which Suisun has agreed to implement are feasible to avoid any potential project impacts to the identified biological resources in the project area. We also find that Suisun and Caltrans reasonably determined that the project qualifies for recognized CEQA categorical exemptions.

6. Ratemaking

The PG&E land involved in the proposed easement is used for gas transmission purposes and is included in PG&E’s gas rate base. PG&E proposes to treat revenues from this easement as Other Operating Revenues, and account for the revenues consistent with the treatment of gas transmission property under the Gas Accord. Revenues will be booked to Federal Energy Regulatory (FERC) Account 493 (Rent from Gas Properties). This treatment of revenues from the proposed easement is unopposed.

7. Discussion

PG&E’s application is made under Section 851, which requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise encumber the whole or any part of its property that is necessary or useful in the performance of its duties to the public. Granting of an easement on

utility property is an encumbrance, and therefore requires approval under Section 851.⁷

The primary question for the Commission in Section 851 proceedings is whether the proposed transaction is adverse to the public interest. In reviewing a Section 851 application, the Commission may “take such action, as a condition to the transfer, as the public interest may require.”⁸ The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.⁹

We find that PG&E’s conveyance of the proposed easement to Suisun would serve the public interest. The proposed easement will not interfere with PG&E’s use of the property or with service to PG&E customers, and will be utilized in a manner consistent with Commission and legal requirements. PG&E’s conveyance of the easement to Suisun would also serve the public interest by enabling Suisun to construct a pedestrian and bicycle path utilizing state and federal grant money prior to September 2002.

We also approve the proposed ratemaking treatment for the compensation that Suisun will pay to PG&E for the easement. Revenue should be credited to FERC Account 493 (Rent from Gas Properties) and accounted for consistent with the treatment of gas transmission property under the Gas Accord.

⁷ As the Commission previously stated: “The language of Section 851 is expansive, and we conclude that it makes sense to read “encumber” in this statute as embracing the broader sense of placing a physical burden, which affects the physical condition of the property, on the utility’s plant, system, or property.” (D. 92-07-007, 45 CPUC 2d 24, 29.)

⁸ D.3320, 10 CRRC 56, 63.

⁹ D.00-07-010 at p. 6.

For all of the foregoing reasons, we grant the application of PG&E pursuant to Section 851, effective immediately.

8. Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. The proposed easement will not interfere with PG&E's use of the property or with service to PG&E's customers, and will be utilized in a manner consistent with Commission and legal requirements.

2. Suisun is the Lead Agency for the proposed project under CEQA.

3. Suisun determined that the proposed project qualifies for a categorical exemption from the CEQA under Guideline Section 15301(c).

4. In July 2001, Caltrans prepared a Study regarding biological resources in the project area for purposes of compliance with CEQA and the NEPA.

5. The Study found that the proposed project will have no direct effects on special-status plants or wildlife.

6. The Study concluded that one direct effect on the natural environment (loss of 1.69 acres of annual grassland and landscaping) would result from the proposed project.

7. The Study concluded that "project commitments" to be undertaken by the City will avoid the four potential impacts associated with the proposed project.

8. In August 2001, Caltrans determined that the proposed project is categorically exempt from CEQA as a Class 4 exemption and/or under Guideline Section 15061(b)(3), and exempt from NEPA.

9. The Commission is a responsible agency for the proposed project under CEQA.

10. Compensation received by PG&E from Suisun for the proposed easement will be credited to FERC Account 493 (Rent from Gas Properties).

11. The project will enable Suisun to construct a bicycle and pedestrian path.

Conclusions of Law

1. The Study and the Notices of Exemption submitted as part of this application are adequate for the Commission's decisionmaking purposes as a responsible agency under CEQA.

2. We find that Caltrans and FHWA reasonably concluded that the proposed project will not result in a direct environmental effect on special-status plants or wildlife, and that specified "project commitments" are feasible to avoid the potential impacts to special-status plants or wildlife.

3. We find that Suisun and Caltrans reasonably concluded that the proposed project qualifies for exemption pursuant to CEQA Guideline Sections 15301(c) and 15304(h).

4. Consistent with Section 851, PG&E's conveyance of the easement to Suisun for the project will serve the public interest and should be authorized.

5. The decision should be effective today in order to allow the easement to be conveyed to Suisun expeditiously.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) is authorized to convey an easement, as described in Exhibit D of the Application, to the City of Suisun City.

2. When the final easement documents are executed, PG&E shall submit a copy of those documents to the Director of the Energy Division within sixty (60) days of this order.

3. PG&E shall credit the fees of \$1,800.00 to Federal Energy Regulatory Commission Account 493 (Rent from Gas Properties).

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.